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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, AND GRACE E. LANG, EXECUTRIX, OF THE ESTATE OF JULIUS C. LANG, DECEASED,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED APRIL 2, 1938.

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INDEX.

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8459

Estate of JULIUS C. LANG, Deceased, and RICHARD E. LANG, Executor and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Certificate to the Supreme Court of the United States of Questions of Law Upon Which the Circuit Court of Appeals for the Ninth Circuit Desires Instruction for the Proper Decision of a Cause—Filed March 18, 1938

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

STATEMENT OF CASE

There is pending before this court a petition by the executors of Julius C. Lang, deceased, and his estate to review a decision of the United States Board of Tax Appeals sustaining a determination by the Commissioner of Internal Revenue of a deficiency in estate taxes owing by the petitioners.

The decedent, Julius C. Lang, died in 1929, a citizen and resident of the State of Washington. At the time of his death there were in force and effect seventeen policies of insurance on his life. They totalled over $200,000.00. Of fourteen — these policies, his wife was beneficiary. The other three named his children as beneficiaries. All the policies required the payment of premiums in advance and acknowledge the receipt of the first premium.

From 1905 until the date of his death, the decedent was married and he and his wife, now surviving him, were both [fol. 2] citizens of Washington, where the community property law obtains. Of the seventeen life insurance policies in effect at the time of his death, fourteen (including the three of which decedent's children were beneficiaries) were applied for by him during his marriage and all the first

premiums precedent to the issuance of the policies and all subsequent premiums were paid from community funds of himself and his wife. The remaining three were issued to him before his marriage. The first few premiums on these three were paid by him out of his separate property and the remainder paid out of community funds.

The Commissioner of Internal Revenue determined a deficiency against the decedent's estate based upon his ruling that the entire proceeds of these insurances should be included in determining the amount taxable in the gross estate, thereby creating an excess over $40,000.00 in the total. This ruling was made under the provisions of § 302(g) of the Revenue Act of 1926:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance taken out by the decedent upon his own life."

The petitioners contend that in determining the value of the gross estate, but one-half of the amounts receivable on the policies should be attributed to the estate of the deceased husband, where the policies were applied for and issued and the premiums on the policies were paid after the marriage and out of the funds of the community belonging to both the husband and wife. As to the policies issued before the marriage, but upon which premiums paid after marriage were paid from the community funds of both husband and wife, a proportionate amount of the insurance determined by the ratio of the premiums paid otherwise than from community funds to the total of premiums paid, plus one-half the remainder, should be attributed to the estate of the deceased husband.

[fol. 3] The record presents the contention that but one-half of the insurance collectible is attributable to the estate of the husband in two forms:

First. Applicable to all the insurance policies, that since the policy premiums are paid for by funds in which the

wife has her one-half community interest, the policies must be deemed to be "taken out by" the community (and hence one-half by the wife), (a) as to the entire fourteen policies on which all the premiums are paid out of community funds and (b) as to a proportionate portion of the three policies issued before marriage, upon which the community funds paid the premiums thereafter.

Second. Applicable to the policies issued after marriage, that since the first prepayment premiums of the policies are required for their issue, they must be deemed to have been applied for by the husband as agent of the community and, when issued to the husband, must be deemed to be "taken out *by*" the community (and hence one-half by the wife) through the husband as the community's agent, the community payments of all subsequent premiums both evidencing the original community character of the application and issue and the continuity of the community ownership.

We have recently had occasion to consider the community property law of the State of Washington in the case of Graham v. Commissioner, No. 8497, March 4, 1938. We there held that in that State the community between spouses is a separate entity for which each spouse, in earning money, acts as its agent.

In Washington, as in other community property states, life insurance purchased with community funds is community property, and the husband cannot defeat its community character by the exercise of a power, given him by the policy, to nominate or change the beneficiary. In re Brown's Estate, 124 Wash, 273, 277; Shields v. Barton, (C. C. A.-7) 60 Fed. (2d) 351, 352; Union Mutual Life Ins. Co. v. Brockerick, 196 Cal. 497, 507.

So completely does the Washington law merge the spouses into the community, that it is with more than jest that the creditor of one of them prior to marriage, ironically speaks of it as a discharge in bankruptcy of the spouse-debtor as to his earnings thereafter. Huyvaerts v. Roedtz, 105 Wash. 657.

[fol. 4] The Commissioner has on this appeal relied on the case of Bank of America v. Commissioner, (C. C. A.-9) 90 Fed. (2d) 981, 983. A somewhat similar question was there presented to this court, arising under the community

property law of the State of California, similar in effect to that of Washington.

In that case the decedent was the insured under policies for which, while married, he had applied and which were issued to him. All the premiums were paid out of the community property of the insured and his wife. The identity of the beneficiaries does not appear. This court, in an opinion by Judge Haney, concurred in by Judge Garrecht, with Judge Wilbur dissenting, held that the entire proceeds of the insurance over $40,000 was properly included in the gross estate subject to tax. In that case it was stipulated that the policies were "taken out by the decedent upon his own life". It was held that the stipulation brought the entire insurance within the terms of the Revenue Act. In that respect the case is distinguishable from the one at bar, there being no such stipulation here.

However, the court in the Bank of America opinion expressed the view that in any case the local law determining such an incident of community property as the agency or principal character of the husband, cannot affect the interpretation of the Revenue Act.

With this view we are not satisfied. The community is an entity, just as a corporation or an association. The Congress could have imposed a tax upon its estate on its termination by death of one of the spouses, but has chosen not so to do. It is, therefore, pertinent to determine whether the husband as its agent or on his own behalf took out the insurance.

It is true that a local rule or statute does not override the provisions of federal tax statutes, but the state law may determine facts of agency or property upon which the federal statute must operate.

In the case of Poe v. Sanborn, 282 U. S. 101, the Supreme Court held that the Washington community property law controlled the application of the phrase "income of individuals" in the statute creating the income tax, and that it was one-half the "income of" each of the spouses. We are unable to distinguish the application of the reasoning in that case on the meaning of the preposition "of" from [fol. 5] its application to the similarly pregnant preposition "by" in the phrase "taken out by" the insured. It supports the reasoning that the Washington law as to the agency character of the husband, determines whether the insurance is taken out "by" him individually or "by" the

community—that is, one-half "by" him and one-half "by" his wife. Not being satisfied with this previous decision by two of the seven Circuit Judges eligible to sit in a court in which two constitute a quorum, and three usually sit, we deem the questions here, in view of their importance, are proper ones to certify.

Desiring instruction for the proper decision of the above cause, of which the nature and facts are as above stated, the Circuit Court of Appeals for the Ninth Circuit submits the following questions:

QUESTIONS CERTIFIED

1. A husband and wife were at all pertinent times residents of the State of Washington, and the husband, during marriage, applied for a policy of insurance on his own life, (which policy was to be payable to beneficiaries other than his estate or his representatives), and, from funds of the community, paid the first premium thereon, required to be paid prior to or concurrent with the issue of the policy, and thereafter received the policy, and all subsequent premiums on such insurance were paid for solely with community funds of the husband and his wife, and the husband, while both spouses resided in the State of Washington, thereafter died. In such a situation, in determining the amount of insurance, if any, in excess of $40,000, to be included in the gross estate of the deceased husband to be subject to the estate tax under the estate tax provisions of the Revenue Act of 1926, and particularly §302(g) thereof, is the entire amount of the insurance in the last sentence described, or only one-half thereof, deemed to be "taken out by" the husband and to be included in the amount in his estate?

2. A resident of the State of Washington, being unmarried, applies for and receives a policy of insurance upon his own life, which policy is payable to beneficiaries other than his estate or his representatives, and pays premiums thereon out of his separate property, and subsequently is married, and, while being married and a resident of the State of Washington, pays further premiums on such policy out of community funds of himself and his wife, and while [fol. 6] both are residents of the State of Washington the

husband dies. In this situation, in determining the amount of insurance, if any, in excess of $40,000 in the gross estate of the deceased husband, sought to be taxed under the estate tax provisions of the Revenue Act of 1926, and particularly § 302(g) thereof, should it be computed by inclusion of that portion of the insurance which is paid for by premiums paid from community funds of the husband and wife?

3. If the answer to the last question be in the negative, should the amount of insurance to be included be that proportion thereof which the premiums paid by the husband out of the funds other than those of the community bear to the total premiums paid plus one-half the remaining insurance?

Dated at San Francisco, California, March 18, 1938.
William Denman, United States Circuit Judge.
Clifton Mathews, United States Circuit Judge.
William Healy, United States Circuit Judge.

A True Copy. Attest March 18, 1938. Paul P. O'Brien, Clerk.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8459

[Title omitted]

AMENDMENT TO CERTIFICATE OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, MARCH 18, 1938, CERTIFYING QUESTIONS OF LAW TO THE SUPREME COURT OF THE UNITED STATES—Filed March 24, 1938

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Desiring fuller instructions upon the law applicable to the facts stated in the Certificate heretofore filed in the above entitled case, we hereby amend said certificate by adding thereto the following considerations and questions.

Concerning those policies of which the wife is beneficiary we have the added consideration that, under the Washington

law concerning her half ownership of the community funds, the beneficiary has paid one-half the premiums producing the benefit.

[fol. 8] ADDITIONAL QUESTIONS

4. Incorporating herein by reference the facts stated in question 1, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of the said insurance policy. If the answer to question 1 be that the entire amount of the insurance there described is to be deemed "taken out by" the husband and deemed to be included in the amount of his estate, does the inclusion of the additional fact herein stated require that only one-half of said insurance is so to be deemed?

5. Incorporating herein by reference the facts stated in question 2, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of said policy. If the answer to question 2 be in the affirmative, does the inclusion of the additional fact herein stated require that one-half of that portion of the insurance which was paid for out of community funds of the decedent and his wife be excluded from the gross estate of the decedent?

Dated at San Francisco, California, March 24, 1938.
William Denman, United States Circuit Judge.
Clifton Mathews, United States Circuit Judge.
William Healy, United States Circuit Judge.

A True Copy. Attest March 24, 1938. Paul P. O'Brien, Clerk.

[File endorsement omitted.]

Endorsed on cover: File No. 42,400. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 919. Richard E. Lang, Executor, and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased, vs. Commissioner of Internal Revenue. Certificate. Filed April 2, 1938. Term No. 919, O. T., 1937.